IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MARK ALLEN BARNES,
Petitioner,

v.

HON. CASEY F. MCGINLEY, JUDGE PRO TEMPORE OF THE
SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

THE STATE OF ARIZONA,
BARBARA LAWALL, PIMA COUNTY ATTORNEY,
Real Party in Interest.

No. 2 CA-SA 2016-0042
Filed August 30, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED FOR PERSUASIVE AUTHORITY.
See Ariz. R. Sup. Ct. 111(a)(3), (c); Ariz. R. Civ. App. P. 28(a)(2);
Ariz. R. P. Spec. Act. 7(g), (i).

Special Action Proceeding
Pima County Cause No. CR20153353001

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Dean Brault, Pima County Legal Defender
By Benjamin Griem, Assistant Legal Defender, Tucson
Counsel for Petitioner

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Real Party in Interest

DECISION ORDER

Chief Judge Eckerstrom authored the decision order of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Mark Barnes seeks review of the respondent judge's order requiring his counsel to file a memorandum detailing defense counsel's conversations with the victim in the underlying criminal action brought against Barnes by the real party in interest State of Arizona. Discovery rulings are properly reviewable by special action. *See State v. Bernini*, 222 Ariz. 607, ¶¶ 3, 8, 218 P.3d 1064, 1066, 1068 (App. 2009). We therefore accept special action jurisdiction. Because it has not interviewed the victim, the state has not met its burden under Rule 15.2(g), Ariz. R. Crim. P., of showing it has a "substantial need" for the information and "is unable without undue hardship to obtain the substantial equivalent by other means," nor has it demonstrated the information is otherwise subject to disclosure. Accordingly, we grant relief.

¶2 Barnes's defense counsel had several unrecorded and private conversations with the victim about the facts of the case. The conversations were initiated by the victim, and counsel has avowed that he will not call the victim at trial or seek to introduce her statements to him. The state has not interviewed the victim, despite there being no indication she is unwilling to be interviewed. The

state sought disclosure of those statements pursuant to Rule 15.2(g), which the respondent judge granted, noting inter alia that the state "absolutely has an important and undeniable need to ensure that it knows all statements of a listed victim, . . . so that it can do its job to ensure that it only prosecutes cases that it has probable cause to prosecute" and that the state could not necessarily "replicate what [counsel] has been told" by interviewing the victim.

¶3 "Ordinarily, if witnesses are available and can be interviewed by a party, there will be no grounds upon which to order production of the statements taken by the opposition." *Longs Drug Stores v. Howe*, 134 Ariz. 424, 429, 657 P.2d 412, 417 (1983). Disclosure is not appropriate absent a showing of good cause to conclude "that the statements are sought to impeach or determine the credibility of the witnesses, or there is a sufficient showing of the unavailability, hostility or problems of recollection of the witnesses" or the "statements contain admissions or are unique because they were taken soon after the event." *Id.* In the absence of any effort to interview the witness, the state cannot demonstrate her statements to defense counsel have any value in impeaching her or in determining her credibility. And, as we have noted, there is no suggestion that she is unwilling or unable to be interviewed by the state.

¶4 Despite the respondent's and state's contrary suggestion, we find no authority supporting the notion that the state is always entitled to any statement made by the victim. We recognize the state has an interest in determining whether it should proceed with prosecution. *See generally State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. 1995). But that interest, in isolation, does not allow the state access to material not otherwise subject to disclosure. The state's belief that the victim's statements to defense counsel have some unique evidentiary value is, at this point, entirely speculative. Thus, the state has shown neither a substantial need for those statements nor that it cannot obtain their substantial equivalent by some other means.

¶5 We additionally note that the United States Supreme Court has emphatically criticized the type of disclosure ordered here.

> [U]nder ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness.

Hickman v. Taylor, 329 U.S. 495, 512-13 (1947).

¶6 We do not decide whether counsel's recollection of the victim's statements constitutes protected work product under Rule 15.4(b)(1), Ariz. R. Crim. P. Nor do we address whether counsel has become a necessary witness as contemplated by Rule 3.7 of the Rules of Professional Conduct, Ariz. R. Sup. Ct. 42, or whether the state is, as Barnes suggests, improperly avoiding exculpatory evidence by refusing to interview the victim.

¶7 We accept special action jurisdiction and grant relief. We vacate the respondent judge's order instructing counsel to provide the state with information about the content of his conversations with the victim.